

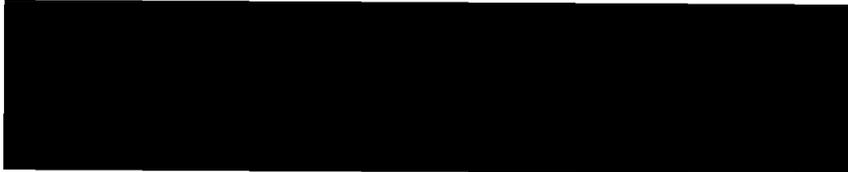
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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DATE: NOV 03 2011 OFFICE: TEXAS SERVICE CENTER

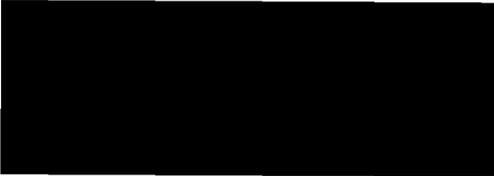
FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on March 12, 2009. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on January 13, 2010. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed. In this case, the respondent failed to submit a statement regarding if the validity of the decision of the AAO has been or is subject of any judicial proceeding.

Notwithstanding the above, in the decision of the AAO dismissing the petitioner's original appeal, the AAO found that the petitioner failed to establish that the beneficiary met at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). In fact, the AAO found that the petitioner failed to establish the beneficiary's eligibility for any of the criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). The AAO specifically and thoroughly discussed the petitioner's evidence and determined that the petitioner failed to establish the beneficiary's eligibility for the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the authorship of scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup> A review of the record of proceeding reflects that counsel indicated on Form I-290B, Notice of Appeal or Motion, that she was "filing a motion to reopen a decision." Moreover, in counsel's cover letter and title of her brief, she indicated that it was a motion to reopen. However, counsel failed to state any new facts and failed to support the motion with any affidavits or other documentary evidence pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). Instead, counsel restated the same arguments she made on appeal and claimed that "we have come to the reluctant, but clear, belief that the writer had first made a determination to reject the appeal and then proceeded to find reasons, including sometimes tortured misreading of clear evidence and gratuitous criticisms that were not germane to the core issues, to justify the decision to dismiss this appeal." Counsel submits on motion no fact that could be considered "new" under 8 C.F.R.

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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

§ 103.5(a)(2) and failed to submit affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden. The motion to reopen will be dismissed.

Notwithstanding the above, although counsel indicated on the Form I-290B, in her cover letter and in the title of her brief that she was filing a motion to reopen, she additionally argued for a motion to reconsider pursuant to the regulation at 8 C.F.R. § 103.5(a)(3) in the body of her brief. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. Rather, the “additional legal arguments” that may be raised in a motion to reconsider should flow from new law or a de novo legal determination reached in its decision that may not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. See *Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991).

On motion, counsel argues that the documentary evidence submitted at the time of the original filing of the petition and on appeal demonstrated the beneficiary’s eligibility for the original contributions criterion, the scholarly articles criterion, and the leading or critical role criterion. In counsel’s brief, she did not contest the decision of the AAO or offer additional arguments regarding the published material criterion. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO). In addition, counsel again argues that the director erred in denying the petition without first issuing a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), an issue addressed by the AAO in its prior decision. Counsel, however, failed to submit “any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy.” Instead, counsel generally disagrees with the findings of the AAO.

For instance, regarding the AAO’s determination that 15 citations to the petitioner’s work was insufficient to establish the beneficiary’s contribution of major significance to the field, counsel argues that 15 citations “demonstrates a wide level of interest” in the petitioner’s work.

Regarding, the leading or critical role criterion, the AAO determined that the petitioner failed to submit sufficient evidence to distinguish the beneficiary's role from that of others within the company so as to establish his leading or critical role. Counsel refers to the recommendation letters from [REDACTED] and claims that "[t]he national acclaim requirement is clearly met by these testimonials." Counsel further argues that the two self-serving letters by the petitioner demonstrated that the beneficiary performed in a leading or critical role. Counsel also states that the letter from the beneficiary's employer establishes both the leading and critical role of the beneficiary within [REDACTED] as well as [REDACTED] distinguished reputation.

Again, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. The AAO thoroughly addressed the petitioner's evidence, including the reference letters, in the decision and found that the petitioner failed to establish the beneficiary's eligibility for the original contributions criterion and the leading or critical role criterion. In addition, the AAO found that the director did not abuse his discretionary authority by denying the petition without first issuing a request for additional evidence.<sup>2</sup> The motion to reconsider does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation, or that there is new precedent or a change in law that affects the AAO's prior decision. As noted above, a motion to reconsider must include specific allegations as to how the AAO erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. Because the respondent has failed to raise such allegations of error in her motion to reconsider, counsel's arguments are not sufficient to meet the requirements of a motion to reconsider.

However, although not raised as an issue by counsel, the AAO finds that it must reconsider its previous finding regarding the beneficiary's scholarly articles in light of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) review of the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.<sup>3</sup> With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122

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<sup>2</sup> It is unclear what remedy counsel sought in reference to her argument regarding the director's failure to issue an RFE. It would have served no useful purpose to remand the case for issuance of an RFE when counsel had the opportunity to submit additional documents on appeal, which, as she acknowledges on motion that she did.

<sup>3</sup> Specifically, the court stated that the AAO had unilaterally imposed novel, substantive, or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

(citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the “final merits determination” as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2), and “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered “sustained national or international acclaim” are eligible for an “extraordinary ability” visa. 8 U.S.C. § 1153(b)(1)(A)(i).

*Id.* at 1119.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires “[e]vidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.” In its prior decision, although acknowledging that the beneficiary had authored several scholarly articles, the AAO found the articles were not sufficient as they did not demonstrate that the beneficiary had “attracted a wide level of interest in his field commensurate with sustained national or international acclaim.” Pursuant to *Kazarian*, 596 F.3d at 1122, the petitioner submitted sufficient documentation establishing that the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Therefore, AAO withdraws its findings for this criterion.

In accordance with the *Kazarian* opinion, the AAO must next conduct a final merits determination. The AAO will not limit its review to a comparison of the beneficiary with others of a similar age or with a similar length of time in his field; rather, the beneficiary must be considered with all in his field. In that context, the AAO must consider whether or not the petitioner has demonstrated: (1) a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2); and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). See also *Kazarian*, 596 F.3d at 1115. The petitioner established that the beneficiary met one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3).

In evaluating the AAO’s final merits determination, the AAO must look at the totality of the evidence to determine the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the beneficiary has conducted routine research, has authored some scholarly articles, and serves as a project lead for the petitioner. However, the accomplishments of the beneficiary

fall far short of establishing that he “is one of that small percentage who have risen to the very top of the field of endeavor” and that he “has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

A review of the documentary evidence reflects that the petitioner submitted 10 scholarly articles that were published in professional or major trade publications or other major media. However, when compared to the authorship of ██████████ (94 articles and 4 books), it appears that ██████████ is far above the accomplishments of the beneficiary. Although the beneficiary met the scholarly articles criterion through his co-authorship and authorship of scholarly articles, he has not established that the minimal publication of such articles demonstrates a level of expertise indicating that he is among that small percentage who have risen to the very top of the field of endeavor. See 8 C.F.R. § 204.5(h)(2).

Further, as authoring scholarly articles is inherent to scholars, the AAO will also evaluate a citation history or other evidence of the impact of the beneficiary’s articles to determine the impact and recognition his work has had on the field and whether such influence has been sustained. For example, numerous independent citations for an article authored by the beneficiary would provide solid evidence that his work has been recognized and that other researchers have been influenced by his work. Such an analysis at the final merits determination stage is appropriate pursuant to *Kazarian*, 596 F. 3d at ██████████. On the other hand, few or no citations of an article authored by the beneficiary may indicate that his work has gone largely unnoticed by his field. The petitioner submitted documentary evidence reflecting that the beneficiary’s work has been cited 15 times. While these citations demonstrate a little interest in his published work, they are not sufficient to demonstrate that his articles have attracted a level of interest in his field commensurate with sustained national or international acclaim at the very top of his field.

Although the petitioner failed to demonstrate that the beneficiary met the original contributions criterion and the leading or critical role criterion, the petitioner based the beneficiary’s eligibility on recommendation letters. USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, USCIS is ultimately responsible for making the final determination

regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the beneficiary's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Furthermore, the petitioner claimed the beneficiary's eligibility for the leading or critical role criterion based on one organization, in which the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires a leading or critical role with more than one organization or establishment.

The AAO cannot ignore that the statute requires the petitioner to submit "extensive documentation" of the beneficiary's sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provides that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). The petitioner's submission of two recommendation letters for the original contribution criterion and two self-serving letters for the leading or critical role criterion is insufficient to establish the beneficiary's sustained national or international acclaim required for this highly restrictive classification.

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The motion to reopen and the motion to reconsider are dismissed, the decision of the AAO dated January 13, 2010, is affirmed, and the petition remains denied.